

ORANGE COUNTY SHERIFF'S OFFICE

LEGAL BULLETIN



Print Date: December 2013	<input type="checkbox"/> Rescinds <input checked="" type="checkbox"/> Amends	Number: 2011-08
SUBJECT: U-Visas		Re-Evaluation Date:
Distribution: ALL PERSONNEL	Related CALEA Standards:	

The "Victims of Trafficking and Violence Protection Act" authorizes the U.S. Government to issue a U-Visa to a qualifying crime victim who is not a citizen of the U.S. A U-Visa grants legal immigration status for up to four years.¹

Background

The U-Visa program was created in response to victims of domestic violence not reporting such crimes because of the threat of deportation. For example, suppose a woman who is in the U.S. illegally, or whose immigration status is dependent upon her spouse, is battered by her husband. "If you go to the authorities, or separate from me, you'll be deported."

The U-Visa program was designed to: (1) strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, human trafficking, and certain other crimes; and (2) offer protection to the victims of those crimes. Lawmakers recognized that a victim's cooperation, assistance, and safety are essential to effective detection, investigation, and prosecution. Victims who fear deportation, however, will be unlikely to cooperate with investigative efforts.

A law enforcement official, prosecutor, Judge, or other federal or state authority that is responsible for detecting, investigating, or prosecuting any of the qualifying crimes may sign a U.S. Citizenship and Immigration Services (USCIS) Form I-918, Supplement B, which is part of an application for a U-Visa. The form certifies that the victim meets certain eligibility requirements (e.g., was the victim of a qualifying crime; has specific knowledge about the crime; is cooperating with law enforcement).

The officials in question are not required by law to sign these certification forms, but U-Visas will not be issued without them. An applicant who doesn't receive a U-Visa may pursue other avenues under federal immigration law to remain in the U.S.

Officials who sign certifications do not confer any immigration status upon the victim. To prove eligibility for a U-Visa, the victim must submit the certification, as well as other pertinent information, to the federal government, which makes the final decision about whether or not to grant a U-Visa. The federal government may reject an application for a U-Visa for a variety of

¹ The term may be extended in certain limited circumstances, such as a law enforcement official certifying the victim's presence continues to be necessary to assist with investigating and prosecuting the case.

reasons, e.g., applicant doesn't meet the criteria, has committed immigration violations or serious crimes, is a security threat.

Please note the U-Visa program does not interfere with the discretion of a law enforcement officer or prosecutor to decide whether or not to investigate or prosecute a particular case. For example, officers may decide there is insufficient evidence that an alleged crime occurred. Therefore, they may take a report, but close the case without further investigation, and they may decline to sign a certification form. Suppose they initiated an investigation and signed such a form, but later decided to terminate the investigation because of lack of evidence. They have discretion to close the investigation, though they signed a certification form.

Who is eligible for a U-Visa?

A victim must meet the following statutory requirements:

- (1) Has suffered substantial physical or mental abuse from being the victim of a qualifying crime;
- (2) The crime occurred in the U.S. or violated the laws of the United States;
- (3) Possesses information about the crime;² and
- (4) Has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the crime.

What is a "qualifying" crime?

A qualifying crime includes one or more of the following, or any similar activity in violation of federal, state, or local criminal law:

Rape	Involuntary servitude
Torture	Slave trade
Trafficking	Kidnapping
Incest	Abduction
Domestic violence	Unlawful criminal restraint
Sexual assault	False imprisonment
Abusive sexual conduct	Blackmail
Prostitution	Extortion
Sexual exploitation	Manslaughter/Murder
Female genital mutilation	Felonious assault
Being held hostage	Witness tampering
Peonage	Obstruction of justice
Perjury	

This list includes attempts, conspiracy, or solicitation to commit any of the above.

What constitutes "substantial physical or mental abuse"?

The USCIS considers several factors in determining whether "substantial physical or mental abuse" occurred, including:

² An exception applies when the victim is under 16 years of age, incapacitated, or incompetent. A parent, guardian, or "next friend" of the petitioner may provide the information and assist in the investigation or prosecution.

- (1) The nature of the injury inflicted;
- (2) The severity of the perpetrator's conduct;
- (3) The severity of the harm the victim suffered;
- (4) The duration of the infliction of the harm; and
- (5) The extent to which there is permanent or serious harm to the victim's appearance, health, or physical or mental soundness.

According to USCIS, there is no single factor that must be present in all cases. Similarly, the existence of one or more of the factors does not automatically mean there was "substantial physical or mental abuse."

If the criminal activity aggravated a pre-existing physical or mental injury, that may be included in the analysis. Also, a series of acts taken together may constitute substantial physical or mental abuse, even when none of the acts alone rise to that level.

Of course, documentation is important, e.g., reports or affidavits from Judges, court officials, medical personnel, school officials, clergy, social workers, and other social service personnel; protection orders and related legal documents; photos of injuries supported by affidavits; and affidavits from witnesses, acquaintances, or family members who have personal knowledge of the facts regarding the criminal activity.

It's important to note that USCIS is responsible for determining who has suffered "substantial physical or mental abuse." Law enforcement may describe known injuries, if any, in the box in Part 3, #6 of the I-918B law enforcement certification form.

What constitutes "helpfulness"?

A victim may petition for U-Visa status at any stage of the investigation or prosecution. Therefore, the definition of "helpfulness" is interpreted broadly, as is the definition of "investigation or prosecution." An investigation need not be complete before signing the certification. Examples of helpfulness include reporting the crime, providing a statement to law enforcement, filing a report with law enforcement, and seeking a protection order. A victim who was granted a U-Visa has an ongoing obligation to provide assistance. Law enforcement officials may notify USCIS directly about cases in which victims refuse to continue assisting the investigation or prosecution of the crime.

Suppose the victim of a qualifying crime assisted with investigating and prosecuting the case, but didn't request a U-Visa certification until years after the case was concluded. The law technically allows a law enforcement official, prosecutor, Judge, or other authorized official to sign a U-Visa certification in those circumstances. However, according to the USCIS, those requests are typically declined.

Who is authorized to issue a U-Visa certification?

Certification must be obtained from a local, state, or federal law enforcement official, prosecutor, Judge, or other federal or state authority that is detecting, investigating, or prosecuting any of the qualifying crimes. The U-Visa certification can be completed at the same time law enforcement officers are completing their reports and can then be reviewed and approved by

supervisors who are also signing off on the reports. U-Visa regulations allow the head of the certifying agency to grant supervisors the authority to issue U-Visa certifications. The regulations contemplate granting certification authority to multiple supervisors. USCIS encourages law enforcement agencies to develop internal policies and procedures for responding to requests.

Is there liability if a person with a U-Visa commits a violent crime?

Suppose a local law enforcement officer signed a certification form, and the applicant, who obtained a U-Visa, subsequently commits a violent crime. Is the local law enforcement officer or agency subject to liability in those circumstances? No. The federal government is the final authority on whether or not to issue a U-Visa. Local law enforcement would not be subject to liability in those circumstances.

How many U-Visas have been issued?

The federal government issued the first U-Visa in 2008, after an 8 year delay. The statute permits up to 10,000 U-Visas to be issued each year. USCIS granted 10,000 U-Visas the last two years and anticipates meeting the cap again in 2012.

What is OCSO policy on this subject?

If an investigating deputy is asked by a victim to sign a certification for a U-Visa, he or she should prepare a memo that summarizes the case and answers the following questions: (1) Did a qualifying crime occur in Orange County? (2) Has the victim suffered "substantial physical or mental abuse" from the crime? (3) Does the victim possess specific information about the crime? (4) Is the victim cooperating in investigating and prosecuting the case?

The deputy should forward the memo through his or her chain of command to the Division Commander for consideration. The Division Commander will review the case, make a recommendation, and forward the package to Legal Services for a legal review.

Each case should be considered on its individual merits. What if a person requests a U-Visa certification, though the case is long over? As discussed above, the U-Visa program was created to assist victims and law enforcement with investigating and prosecuting certain crimes. It's difficult to argue any such interest is served when the case in question is inactive because it was concluded years before. Therefore, in general, the OCSO declines to sign U-Visa certifications in such cases.

Conclusion

In short, federal law authorizes the U.S. Government to issue a U-Visa to a qualifying crime victim who is not a citizen of the U.S. A U-Visa grants legal immigration status for up to four years, allowing the victim to assist with investigating and prosecuting the case.

Law enforcement is among the authorities qualified to sign a certification form, which is part of the application for a U-Visa. The form certifies that the victim meets certain eligibility requirements (e.g., was the victim of a qualifying crime; has specific knowledge about the crime; is cooperating with law enforcement). Law enforcement may use the certification form to notify USCIS of any pertinent information about the case, such as known injuries. USCIS, not the

investigating or prosecuting authorities, is responsible for determining if the victim suffered “substantial physical or mental abuse.”

A law enforcement officer maintains discretion about whether or not to investigate a case. Similarly, law enforcement and other qualified officials have discretion to decide whether or not to sign certification forms. The OCSO is in the process of drafting policy about this issue.

Orange County deputies with questions about this bulletin may contact the Legal Services Section for assistance. Persons who are not employed by the Orange County Sheriff's Office should consult their own legal advisors before taking action on this subject matter.

(This bulletin was prepared by Wili Hirschey, Paralegal, and Bernie Rice, General Counsel.)